

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In a Matter Between:)	
)	
PRIME HEALTHCARE SERVICES, d/b/a)	
SAINT MARY'S REGIONAL MEDICAL)	
CENTER, RENO,)	
)	
Employer,)	Case 32-RC-156669
and)	
)	
CALIFORNIA NURSES ASSOCIATION/)	
NATIONAL NURSES ORGANIZING)	
COMMITTEE/NATIONAL NURSES)	
UNITED (CNA/NNOC/NNU),)	
)	
Petitioner,)	
)	

**PETITIONER CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES
ORGANIZING COMMITTEE/NATIONAL NURSES UNITED'S REQUEST FOR REVIEW
OF REGIONAL DIRECTOR'S DECISION AND ORDER**

MICAHA BERUL
CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED
LEGAL DEPARTMENT
2000 Franklin Street
Oakland, CA 94612
Telephone: 510-273-2292
Facsimile: 510-663-4822
mberul@calnurses.org
Counsel for Petitioner
CNA/NNOC/NNU

I. INTRODUCTION

Pursuant to Section 102.67 of the Board's Rules and Regulations, California Nurses Association/National Nurses Organizing Committee/NNU (the Petitioner or the Union) submits this Request for Review of the Regional Director's Decision and Order (DOR) issued on August 14, 2015. Substantially departing from controlling Board precedent, the Regional Director dismissed a petition for a self-determination election under the Board's *Armour-Globe*¹ doctrine.

The Union petitioned for a self-determination election to allow the hospice nurses of Prime Healthcare Services d/b/a St. Mary's Regional Medical Center (the Employer) to vote whether they wished to join the Union's existing bargaining unit of Registered Nurses employed by the Employer. The Regional Director found that the hospice nurses share a community of interest with the existing bargaining unit of Registered Nurses, but he departed from officially reported Board precedent in finding that the hospice nurses do not constitute an identifiable, distinct segment of employees so as to constitute an appropriate voting group under *St. Vincent Charity Medical Center*, 357 NLRB No. 79, slip op. at 1 (2011).

Petitioner respectfully requests the Board to grant review for the reasons set forth below, and direct an election in the petitioned-for unit.

II. GROUNDS FOR SEEKING REVIEW OF THE REGIONAL DIRECTOR'S DECISION.

The Board will grant a request for review of a Regional Director's actions only upon one or more of the following grounds set forth in Section 102.67(c) of the Board's Rules and Regulations, including:

- (1) That a substantial question of law or policy is raised because of. . .

¹ *Armour & Co.*, 40 NLRB 1333 (1942) and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

(ii) A departure from, officially reported Board precedent.

The Board should grant Petitioner's request for review because the Regional Director's departure from officially reported Board precedent concerning what constitutes an identifiable, distinct segment of employees so as to constitute an appropriate voting group in a self-determination election raises substantial questions of law and policy, and has deprived the hospice nurses of their Section 7 right to vote on whether they wish to be included in the existing bargaining unit.

III. THE REGIONAL DIRECTOR'S ANALYSIS REFLECTS A DEPARTURE FROM BOARD PRECEDENT.²

The Regional Director departed significantly from Board precedent with regard to what constitutes an appropriate voting group under the Board's *Armour-Globe* doctrine. The Regional Director found, in essence, that because the hospice and home health nurses both share a community of interest with the existing unit, and with each other, a voting group consisting solely of hospice nurses in a self-determination election would be an arbitrary segment of employees. DOR at 5-6. The Regional Director's analysis substantially departs from the test set forth in *St. Vincent Charity Medical Center* as to what constitutes an identifiable distinct segment of employees which would constitute an appropriate voting group. *St. Vincent Charity Medical Center*, supra, slip op. at 2. Setting forth the applicable test, the Board stated that "a self-determination election is the proper method by which an incumbent union. . . may add unrepresented employees to its existing unit, if the employees sought to be included share a community of interest with the unit employees and 'constitute an identifiable, distinct segment so as to constitute an appropriate voting group.'" *Id.* (citing *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990)).

² "Tr. ____" refers to the pages of the transcript of the hearing in this matter.

The Regional Director correctly found that the petitioned-for “hospice nurses share a community of interest with the existing unit of registered nurses.” DOR at 5. However, as discussed below, the Regional Director departed from Board law in finding that the hospice nurses do not constitute a “distinct segment” of the Employer’s unrepresented nurses. The Regional Director, in finding that the voting group must also include the Employer’s home health nurses, also substantially departed from Board precedent by failing to place the burden on the Employer - the party contending the petitioned-for voting group of hospice nurses was inappropriate - to establish that the hospice nurses and home health nurses share an “overwhelming community of interest” such that a voting group that did not include both groups of nurses would be arbitrary. See *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 10 (2011), enfd. 727 F.3d 552 (6th Cir. 2013).

Nor does the Regional Director find that the hospice and home health nurses share an overwhelming community of interest. The Regional Director’s reasoning that because the hospice and home health nurses equally share a community of interest with the existing unit, the hospice nurses constitute an arbitrary segment of employees has long been rejected by the Board. The existence of *some* community of interest between the group the Union is seeking to add to an existing unit and some other unrepresented employees is irrelevant. *Warner-Lambert Co.*, 298 NLRB at 995. As set forth in *Specialty Healthcare*, for an employer to prove that the smallest appropriate unit has to include other unrepresented employees, it must show an overwhelming community of interest between the unit the union is seeking and other unrepresented employees. *Specialty Healthcare & Rehabilitation Center of Mobile*, supra, slip op. at 20.

The only issue in an *Armour-Globe* self-determination election, if the petitioned-for employees are found to share a community of interest with the existing unit, as the Regional Director found, is whether the petitioned-for grouping of employees constitutes an identifiable distinct segment of employees to compose an appropriate voting group.³ *St. Vincent Charity Medical Center*, supra, slip op. at 2. As discussed below, the hospice nurses clearly constitute a distinct, identifiable segment of the employer's unrepresented employees, and, accordingly, are an appropriate voting group under the Board precedent from which the Regional Director departed.

In *St. Vincent Charity Medical Center*, the Board found 15 to 17 phlebotomists to comprise "an appropriate voting group" for a self-determination election to determine if the phlebotomists wished to be added to the existing unit, rejecting the Regional Director's finding that other residual unrepresented employees must be included in the voting group. *Id.* at 1-2. Of significance to the Board in finding the phlebotomists to constitute a distinct, identifiable segment of the employer's unrepresented employees were the following facts: the grouping of phlebotomists "perform the same distinct functions, are in the same distinct employee classification, are organizationally in the same division in the hospital laboratory, work in the same location in the employer's hospital, and have the same supervision." *Id.* at 3.

Similarly, in *Seattle Children's*, Case 19-RC-150590 (Board Order, June 29, 2015), the Board denied the employer's request for review of the Regional Director's Decision and Direction of Election. In *Seattle Children's*, the petitioner sought a self-determination election to add the employer's access control technicians and access control/radio officer classifications to

³ Even in the framing of the issue at the hearing, the Regional Director erred, as "the Regional Director directed that the following issues will be litigated in this proceeding," including "whether or not home healthcare nurses are part of the same identifiable distinct segment of employees as the hospice nurses." (Tr. 17). The issue should have been framed as whether the hospice nurses constitute a distinct, identifiable voting group.

the existing unit. The fact that the access control technicians and access control/radio officer classifications “are the only two positions that maintain and repair locks,” the Regional Director determined, alone, was sufficient to qualify the classifications as an identifiable and distinct segment of the employer’s workforce. *Seattle Children’s*, Case 19-RC-150590 (Decision and Direction of Election, May 6, 2015).

Here, the record firmly establishes that the hospice nurses are an identifiable and distinct segment of the employer’s workforce, and the Regional Director’s contrary finding departs substantially from Board precedent. Hospice nurses are the only Registered Nurses who provide hospice care. They work in the same department (Tr. 49, 64, 67, 83, 87, 104, 136) with the same direct supervisors, Kimberly Martin and Michelle Mamola (Tr. 26), who report to the Hospice Department Director, Piper Gals (Tr. 26), who in turn reports to the Employer’s Chief Nursing Officer Grimm (Tr. 27). The Hospice Department RNs when not in the field (Tr. 91), or working at the hospital (Tr. 93), primarily report to the Employer’s 690 Sierra Rose Drive address (Tr. 31). Hospice nurses are also subject to guidelines and protocols unique to them. (Tr. 64). Home health nurses, by contrast, are in their own department (Tr. 50) and are subject to separate supervision from the Hospice Department RNs (Tr. 145).

As the record evidence makes clear, hospice nurses are also the only nurses in the Employer’s workforce who are “deal[ing] specifically with the dying patient.” (Tr. 104). As a result of this unique nursing role, “the focus of care” is very different in the hospice setting. (Tr. 71). CNO Grimm testified that the focus in the hospice setting is on palliative care and making the patient comfortable as opposed to home health nurses’ focus on curing the patient (Tr. 71). Hospice care is geared towards making dying patients comfortable in the last period of their life (Tr. 73). Patients treated by home health nurses, by contrast, are “choosing to pursue aggressive

treatment until... their last day.” (Tr. 73). CNO Grimm also testified that with dying patients, “it’s the gift of helping people at the end of life that attracts nurses to that profession.” (Tr. 72). RN May testified that, as opposed to curative medicine, hospice care involves end of life treatment, allowing patients to stay in their homes for what time they have left (Tr. 91), likening it to a “calling” to focus on the quality of the “end of life” versus “everything about saving one’s life.” (Tr. 90). RN Cavendish testified that a Hospice Department RN is called upon to serve the role of “a psychologist and a therapist” because of the unique aspects of hospice nursing (Tr. 146).

Hospice nurse Johna May testified that hospice nurses never worked with home health nurses. (Tr. 104). Hospice nurse Maria Cavendish testified that she had never spoken to a home health nurse. (Tr. 145). Hospice nurses have so little interaction with home health nurses, other than having adjacent office space in an off-site building when they are not in the field (Tr. 31), that both hospice nurses who testified indicated they knew little to nothing about home health nurses’ duties (Tr. 104). RN Cavendish testified that she learned for the first time about their duties from the CNO’s testimony at the hearing (Tr. 145).⁴

Thus, like the phlebotomists in *St. Vincent Charity Medical Center*, supra, the hospice nurses perform the same functions, are in the same distinct employee classification, are organizationally in the same division, work out of the same facility when not in the field or the main hospital, and have the same supervision. And as with the control technicians and access control/radio officer classifications in *Seattle Children’s*, supra, who by virtue of being the only

⁴ Far from requiring the Employer to establish interaction between hospice nurses and home health nurses given its burden under *Specialty Healthcare*, supra, to show an overwhelming community of interest between the hospice nurses and home health nurses, the Regional Director departed from Board precedent in finding that “the record does not affirmatively establish that there is no interaction between hospice and home health nurses,” placing the burden on Petitioner. Nevertheless, the above-referenced testimony of hospice nurses May and Cavendish demonstrates the lack of interaction between the hospice nurses and home health nurses.

two positions in the employer's workforce that maintain and repair locks constituted an appropriate voting group, the fact that the hospice nurses are the only nurses dedicated to end of life palliative care, alone, establishes that the hospice nurses comprise an identifiable distinct segment of employees to constitute an appropriate voting group.⁵ The record evidence does not remotely establish an overwhelming community of interest between the hospice and home health nurses to indicate that the petitioned-for voting group of hospice nurses is an arbitrary segment of the employer's workforce.⁶ Unlike hospice nurses, home health nurses work exclusively in patients' homes, are in a separate department with separate supervision, have differently structured care teams, and meet as a department at different intervals.

Finally, it should be stressed that in *Warner-Lambert Co.*, supra, the Board reversed the Regional Director's dismissal of the union's petition for a self-determination election among packaging machine mechanics to vote on whether they wished to be included in the existing bargaining unit of machine and repair employees and directed a self-determination election. *Id.* at 996. The Board rejected the Regional Director's reasoning that because the packaging machine mechanics shared a community of interest with the employer's unrepresented production employees, their inclusion in the existing bargaining unit through a self-determination

⁵ Compare *Capital Cities Broadcasting*, 194 NLRB 1063 (1972). The Regional Director cited *Capital Cities Broadcasting* (DOR at 5), where the petitioned-for voting group was held to be an arbitrary segment of employees. The petitioned-for voting group in *Capital Cities Broadcasting*, however, sought to exclude employees with common supervision, common work location, and integration of functions with the petitioned-for voting group, facts which are not present here. *Id.* at 1064. Again, the hospice nurses and home health nurses have separate supervision, perform distinctly different functions, and report to adjacent offices only when they are not in the field or in the hospital. Moreover, the petitioned-for voting group in *Capital Cities Broadcasting* did not even have common supervision. *Id.*

⁶ The Regional Director's finding that patients frequently move on from home health care to hospice care hardly demonstrates an overwhelming community of interest between these distinct groups of nurses. DOR at 6. That a home health patient becomes terminally ill and may seek hospice care does not indicate (nor does the record show) overlap in functions between hospice and home health nurses. Similarly, the Regional Director's finding that home health nurse "sometimes" assist a hospice nurse with wound care (DOR at 6) is of little to no relevance in establishing an *overwhelming* community of interest between the hospice nurses and home health nurses.

election would not be an appropriate bargaining unit. *Id.* at 995. The Regional Director’s finding that the shared community of interest between hospice nurses and home health nurses (DOR at 6) precludes a finding that the hospice nurses constitute an identifiable, distinct grouping of employees departs substantially from controlling precedent in *Warner-Lambert Co.*, *supra*, and *St. Vincent Charity Medical Center*, *supra*.

The petitioned-for voting group of hospice nurses, as in *St. Vincent Charity Medical Center* is “neither arbitrary nor a random grouping of employees” in light of the record evidence discussed above. *St. Vincent Charity Medical Center*, *supra*, slip op. at 2. And the Regional Director’s contention that including only the hospice nurses in the voting group could lead to a proliferation of bargaining units (DOR at 6) because home health nurses “would themselves be left in a standalone unit should they seek to organize” is flawed. Taken to its logical conclusion, such reasoning would require an *Armour-Globe* election for registered nurses in the healthcare industry to include at all times all unrepresented nurses with whom a community of interest is shared, denying the Section 7 rights of nurses to vote in a self-determination election when they so choose. As the Board emphasized in *St. Vincent Charity Medical Center*, “an *Armour-Globe* self-determination election. . . undeniably avoids any proliferation of units. . . because it does not result in the creation of and election in a separate, additional unit.” *St. Vincent Charity Medical Center*, *supra*, slip op. at 2.

Petitioner has clearly established that the hospice nurses comprise an identifiable distinct segment of employees to constitute an appropriate voting group. The Regional Director’s departure from Board precedent in dismissing the petition raises substantial question of law and policy.

VI. CONCLUSION

For all of the above reasons, the Board should grant review and direct an election in the petitioned-for unit.

DATED: August 28, 2015

Respectfully submitted,



Micah Berul
Registered In-House Counsel for Petitioner
CNA/NNOC/NNU

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

**PETITIONER CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES
ORGANIZING COMMITTEE/NATIONAL NURSES UNITED'S
(CNA/NNOC/NNU) REQUEST FOR REVIEW**

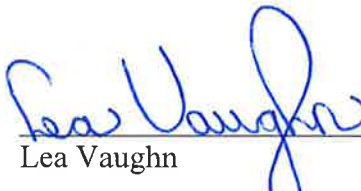
via Electronic Mail addressed as follows:

George P. Velastegui, Regional Director
National Labor Relations Board – Region 32
Oakland Federal Building
1301 Clay Street, Room 300-N
Oakland, CA 94612-5211
E-mail: George.Velastegui@nlrb.gov

Mary K. Schottmiller
Prime Healthcare Management, Inc.
3300 East Guasti Rd, 3rd Floor
Ontario, CA 91761
E-mail: mschottmiller@primehealthcare.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: August 28, 2015



Lea Vaughn